

Statement of Alice Saylor
Attorney, STB General Counsel's Office

STB Docket No. 42060
North America Freight Car Association — Protest and Petition for Investigation —
Tariff Publications of The Burlington Northern and Santa Fe Railway Company

STB Docket No. 42060 (Sub-No. 1)
North America Freight Car Association v. The Burlington Northern and Santa Fe
Railway Company

Chairman Nober, Vice Chairman Mulvey, Commissioner Buttrey, good morning.

The decision submitted for your consideration addresses two related proceedings. The first involves a protest and petition for investigation filed by a group representing some owners of private rail cars. They challenge certain rules and tariff charges of The Burlington Northern and Santa Fe Railway Company that impose new storage and diversion charges on empty private tank cars. They argue essentially that these charges are not permissible under an agreement, referred to as "The Ex Parte No. 328 Agreement," that was approved, or "prescribed," by the Board's predecessor, the Interstate Commerce Commission, back in 1986. This Agreement was the product of an industry-wide negotiation between railroads and private car owners. It contains a formula for calculating the "mileage allowances" that railroads that utilize private tank cars must pay to the cars' owners. It also provides that no tariff that departs from the allowance system prescribed in the Agreement is allowed unless it is found to be lawful after an investigation by the agency. And so the question in the first proceeding is whether the new storage and diversion charges are departures from the allowance system prescribed by the ICC.

The draft decision would deny the petition because it concludes that the BNSF storage and diversion charges at issue are not "departure tariffs" as contemplated in the Ex Parte No. 328 Agreement. Relying on the language of the Agreement itself, the applicable precedent, and the intent of the parties as shown in testimony from participants in the negotiating sessions, the draft finds that these charges do not change, or "cap," the mileage allowances set under the formula, and so the Agreement does not prevent the carrier from imposing them.

The second proceeding involves a complaint alleging that BNSF's imposition of storage and demurrage charges on all types of private cars violates various provisions of the statute. The draft decision before you would deny BNSF's motion to dismiss the complaint. In considering a motion to dismiss at an early stage of a proceeding, prior to submission of evidence, the Board must view the complaint in the light most favorable to complainant in order to ensure that the Board does not prematurely cut off a party's opportunity to make its case by submitting evidence. Based on that standard, the draft decision would allow the complaint to go forward, and it directs the parties to submit a procedural schedule.

We would be happy to address any questions you might have. Thank you.